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No. 105, Original (31)

In The

Supreme Court of the United States

STATE OF KANSAS,

Plaintiff,

v.

STATE OF COLORADO,

Defendant,

UNITED STATES OF AMERICA,

Defendant-Intervenor.

On Exceptions To The Third Report Of The Special Master

COLORADO'S REPLY TO BRIEF FOR THE UNITED STATES IN OPPOSITION TO THE EXCEPTIONS OF KANSAS AND COLORADO

KEN SALAZAR
Attorney General of Colorado

CAROL D. ANGEL
Senior Assistant Attorney General

DAVID W. ROBBINS
Special Assistant Attorney General
Counsel of Record

DENNIS M. MONTGOMERY
Special Assistant Attorney General

HILL & ROBBINS, P.C.
1441 – 18th Street, #100
Denver, Colorado 80202
(303) 296-8100

COCKLE LAW BRIEF PRINTING CO., (800) 225-6964
OR CALL COLLECT (402) 342-2831

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COLORADO'S REPLY TO BRIEF FOR THE UNITED STATES IN OPPOSITION TO THE EXCEPTIONS OF KANSAS AND COLORADO

I. INTRODUCTION

The United States was allowed to intervene in this original action as a defendant to protect federal interests related to the operation of federal reservoirs in the Arkansas River Basin in Colorado. The claims regarding the Winter Water Storage Program in Pueblo Reservoir and the operation of Trinidad Reservoir were resolved in the liability phase, and the United States did not participate in the remedies phase of this case, which related to Kansas' claim that post-Compact well pumping in Colorado had violated Article IV-D of the Compact. Nevertheless, the United States has chosen to address two questions raised by Colorado's and Kansas' exceptions to the Third Report of the Special Master: (1) whether a money damages remedy based, in part, on the losses incurred by individual Kansas water users due to post-Compact well pumping in Colorado violates the Eleventh Amendment, and (2) whether the Special Master erred in recommending that a money damages remedy include prejudgment interest, but that prejudgment interest should only be awarded from 1969 to the date of judgment.[1]

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[1] The United States has no direct interest in these issues. The Eleventh Amendment is not a bar to a suit by the United States against a state, *Alden v. Maine*, 527 U.S. 706, ___, 144 L. Ed. 2d 636, 679 (1999), and the general rule is that prejudgment interest is due on debts owed to the federal government, including debts owed by states and local governments. *United States v. Texas*, 507 U.S. 529, 533-34 (1993).

II. *NORTH DAKOTA V. MINNESOTA* CANNOT FAIRLY BE DISTINGUISHED ON THE BASIS SUGGESTED BY THE UNITED STATES

The United States recommends that Colorado's exception to the Master's Third Report based on the Eleventh Amendment be overruled. Brief for the United States 21. The United States contends that under this Court's cases, the Eleventh Amendment bars a suit by a state "only if it is appearing as a nominal party for the purpose of advancing the private claims of individual citizens of the State against another State." *Id.* at 11. The United States asserts that in this case Kansas has sued to protect its sovereign interest as a party to an interstate compact and its quasi-sovereign interests in the health and economic well-being of its citizens, and contends: "Nothing in the Eleventh Amendment bars the Court from calculating the amount of those damages by reference to the injuries sustained by the individual water users who comprise [a part of] the general population that Kansas has a legitimate quasi-sovereign interest in protecting." *Id.*

The United States asserts that *New Hampshire v. Louisiana*, 108 U.S. 76 (1883), and *North Dakota v. Minnesota*, 263 U.S. 365 (1923), illustrate circumstances in which a suit by a state is barred under the Eleventh Amendment because the state was appearing "only as a nominal party in presenting personal claims of its citizens, and not as *parens patriae* seeking to protect the general interests of the State and its inhabitants." Brief for the United States 16. The United States states that in *New Hampshire v. Louisiana* the Court concluded that the suit was barred by the Eleventh Amendment because it was a mere subterfuge for recovery on behalf of individual bondholders because the states were acting as mere collection agents of the owners of the bonds and coupons, the suits were under the actual control of individual citizens, and were prosecuted by and for them. *Id.* at 15-16.

The United States says that in *North Dakota v. Minnesota* the Court ruled that the Eleventh Amendment barred North Dakota from bringing a damages claim against Minnesota for losses to individuals because the Court found that nearly all of the North Dakota farm owners whose crops, lands, and property were injured in floods had contributed to a fund which had been used to aid in the preparation and prosecution of the lawsuit and that it appeared that each contributor expected to share in the benefit of the decree for damages "in proportion to the amount of his loss." *Id.* at 16, quoting *North Dakota v. Minnesota*, 263 U.S. at 375. Thus, according to the United States, "North Dakota was acting, not as *parens patriae*, but as a trustee, seeking to present and enforce private claims of its citizens." *Id.* at 17.

New Hampshire v. Louisiana can be distinguished on the basis suggested by the United States, but not *North Dakota v. Minnesota*. In *North Dakota v. Minnesota*, the State of North Dakota was acting in its quasi-sovereign capacity to protect the general comfort, health, and property rights of its inhabitants injured by flooding. *North Dakota v. Minnesota*, 263 U.S. at 374, 375-76.[2] Since that was a proper action by North Dakota to protect its quasi-sovereign interest in the general health and welfare of its residents, if the reasoning of the United States is correct, the calculation of damages based on the losses suffered by the farm owners in North Dakota should have been permitted. *See* Brief for the United States 19.

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[2] The United States asserts that the Master concluded, and Colorado does not dispute, that Kansas is seeking recovery for injuries to its legitimate quasi-sovereign interest in the general economic well-being and property of its citizens, interests which are "independent and behind the titles of its citizens." Brief for the United States 18. However, that was also true in *North Dakota v. Minnesota*. Colorado disputes that losses to individuals are the proper measure of injury to Kansas' quasi-sovereign interests.

If the United States is correct that the Eleventh Amendment does not bar the Court from calculating the amount of damages awarded to a state for vindication of its quasi-sovereign interests based on the losses sustained by individuals, then the fact that North Dakota intended to pay over the damages it recovered to the farm owners who had been injured by the flooding should have been irrelevant, since this Court has said that a state is free to spend the money recovered as damages for vindication of the general public interest in any way it determines is in the public interest. *Texas v. New Mexico*, 482 U.S. 124, 132 n.7 (1987). Likewise, the fact that North Dakota farm owners injured by the flooding contributed to a fund that had been used to aid in the preparation and prosecution of the cause should have been irrelevant. Focusing on the source of funding to prepare or prosecute the lawsuit is to elevate form over substance.

In this case, Kansas has enacted a statute that any funds recovered as damages will be paid into an interstate water litigation fund, a portion of which will be used for projects to assist water users in areas directly impacted by the provisions of the Compact. Kan. Stat. Ann. §§ 82a-1801 to 1803 (set out in the Appendix). However, the first use of the funds is to reimburse the Kansas Attorney General for expenses incurred in this litigation and in preparation for the litigation. Kan. Stat. Ann. §§ 82a-1801(a)(1) and (b). Kansas argues, based on *Texas v. New Mexico*, that prejudgment interest on the damages awarded based on the losses suffered by the individual water users in Kansas should be based on the interest rates experienced by the water users precisely because Kansas could distribute the damages to them. Reply Brief for Kansas Opposing the Exceptions of Colorado 35-36. If Kansas is correct in its reading of *Texas v. New Mexico*, it could direct that the money damages recovered in this case be paid directly to Kansas water users "in proportion to the amount of [their] loss." Thus, having first deducted the expenses incurred to prepare and prosecute this litigation from the damages that might be distributed to

Kansas water users, it could be said that the water users in Kansas are paying the expenses to prepare and prosecute this lawsuit.

The fact that the North Dakota farm owners had contributed to a fund to prepare and prosecute the lawsuit or that it appeared that North Dakota intended to pay over the damages to the farm owners whose crops, lands, and property were injured in proportion to the amount of their losses is not a principled basis to distinguish *North Dakota v. Minnesota* from this case, and will simply ensure that in the future states suing for damages to their sovereign or quasi-sovereign interests do not accept contributions from the individuals injured to prepare or prosecute the lawsuit or say that they intend to pay over what is recovered to those injured, at least until the lawsuit is over.[3]

In fact, Colorado believes that *North Dakota v. Minnesota* rests on a different ground, namely, that there is a distinction between losses to a state's proprietary and quasi-sovereign interests and losses suffered by private parties. *See Alfred L. Snapp & Son, Inc. v. Puerto Rico*, 458 U.S. 592, 602 (1982) ("Interests of private parties are obviously not in themselves sovereign interests, and they do not become such simply by virtue of the State's aiding in their achievement.").[4] In a proper original action, a state may sue another state for injuries to its quasi-sovereign interests in the comfort, health, and prosperity of its inhabitants, but that right is to be distinguished from its

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[3] The effect would be that states could prosecute *parens patriae* claims and recover damages based on the losses incurred by individuals so long as the arrangement was in effect a contingency fee rather than payment of costs and expenses by the individuals injured.

[4] The $5,000 in damages claimed by North Dakota were to its proprietary interests in roads and bridges damaged by flooding. 263 U.S. at 371-72. *See Alfred L. Snapp & Sons, Inc. v. Puerto Rico*, 458 U.S. 592, 601-07 (1982) (describing proprietary and quasi-sovereign interests of the states).

lost power as a sovereign to present and enforce individual claims of its citizens as their trustee. *North Dakota v. Minnesota*, 263 U.S. at 374-76. To say that a state may not present and enforce individual claims of its citizens as their trustee, but may recover damages to its sovereign and quasi-sovereign interests calculated "by reference to the injuries sustained by the individual water users" is mere word play that ignores the underlying purpose of the Eleventh Amendment, which was to protect the states from unconsented suits by citizens. *Seminole Tribe of Florida v. Florida*, 517 U.S. 44, 54 (1996). This is particularly true if the state is free to decide that it is in the public interest to distribute the damages to the individual water users who were injured.

III. THE "AGGREGATION" THEORY ADVANCED BY THE UNITED STATES FAILS TO CONSIDER *PARENS PATRIAE* CASES WHERE THE ELEVENTH AMENDMENT IS NOT A BAR

The United States argues that the Master's recommendation that damages include the losses suffered by individual Kansas water users does not violate the Eleventh Amendment because the Master merely calculated the injuries to Kansas' proper quasi-sovereign interest in its residents' health and welfare as "the sum of the damages for injuries to Kansas's residents, including the direct injuries suffered by water users." Brief for the United States 20. According to the United States, once this Court determined that Kansas had "appropriately commenced the current action to protect its sovereign and quasi-sovereign interests" under the Compact, the Eleventh Amendment was no longer an issue, and Kansas' damages could be measured in any fair and equitable manner. *Id.* at 18, 21. This "aggregation" theory, however, is inconsistent with this Court's explanation of the concept of *parens patriae* standing and will create real problems in the expanding field of *parens patriae* litigation.

This Court originally recognized the states' ability to bring *parens patriae* actions against sister states to enjoin public nuisances. *See Alfred L. Snapp & Son, Inc. v. Puerto Rico*, 458 U.S. at 602-05, and cases cited therein. Later cases recognized the states' interests as *parens patriae* in general economic well being, *id.* at 605-07, and in participation in the federal system. *Id.* at 607-08. As *Snapp* exemplifies, states are filing *parens patriae* actions against private entities with increasing frequency. States have sought to protect their general economies from anti-competitive actions, *see Hawaii v. Standard Oil Co.*, 405 U.S. 251 (1972), and from fraudulent conspiracies. *See People v. Life of Mid-America Ins. Co.*, 805 F.2d 763 (7th Cir. 1986); *People ex rel. Abrams v. Seneci*, 817 F.2d 1015 (2d Cir. 1987). States have also sought recoveries for natural resources damages. *See Satsky v. Paramount Communications, Inc.*, 7 F.3d 1464 (10th Cir. 1993); *Alaska Sport Fishing Ass'n v. Exxon Corp.*, 34 F.3d 769 (9th Cir. 1994).

Parens patriae actions by states against private parties raise some difficult issues in determining damages. Although this Court's decision to dismiss Hawaii's *parens patriae* claim for triple damages under § 4 of the Clayton Act in *Hawaii v. Standard Oil Co.* ultimately turned on Congress' intent in enacting the Clayton Act, the Court expressed concern about possible double recoveries if a state were able to recover for general economic injuries while its residents were allowed to recover for all their economic injuries. *Hawaii v. Standard Oil Co.*, 405 U.S. at 263-64. In dissent, Justice Brennan noted that *parens patriae* recovery

> does not necessarily lead to double recovery. Since Hawaii is by definition asserting claims 'independent of and behind the titles of its citizens,' there may be excluded from its recovery any monetary damages that might be claimed by its citizens individually or as part of a properly constituted class.

Id. at 276-77 (citation omitted). The United States' theory here that *parens patriae* damages may be measured by

reference to individual damages, of course, will virtually guarantee double recovery in any situation where individual claims for damages are not foreclosed by the Eleventh Amendment.

There is another potential result of the United States' "aggregation" theory, the opposite of double recovery but equally undesirable. Under a number of environmental statutes, states have obtained recoveries for natural resources damages. Courts have held that state recoveries for damages to quasi-sovereign interests do not preclude private actions for damages to private interests. *Satsky v. Paramount Communications, Inc.*, 7 F.3d 1464 (10th Cir. 1993). Where a state has recovered for natural resources damages to a general public interest, such as recreational fishing, however, private citizens are precluded from seeking recovery for their loss of enjoyment of that interest. *Alaska Sport Fishing Ass'n v. Exxon Corp.*, 34 F.3d 769 (9th Cir. 1994). If a state is entitled to recover damages to its quasi-sovereign interests that are the sum of private citizens' damages, it follows that under *res judicata* those private citizens are bound by the previous judgment and cannot seek to recover their own damages.

Neither of these results – double recoveries or allowing a state to recover damages rather than the individuals who suffered them – is desirable.[5] This Court has always emphasized that a state's interest as *parens patriae* is separate and independent from the interests of particular private parties, *e.g.*, *Snapp*, 458 U.S. at 607, and that is why the Master's quantification of damages based on the

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[5] The Master concluded that the potential for double recovery should not be a problem in this case because, if the losses suffered by Kansas water users are included in any damages awarded, such a judgment should "seal off" any later recovery attempts by the water users. App. to Third Report 33. But, it is not desirable to allow a state to recover damages based on losses suffered by private individuals and preclude the private individuals from recovering those losses.

losses incurred by individual water users in Kansas should not be accepted.

Colorado acknowledges that this Court has broad power in a case between states to fashion a fair and equitable remedy for breach of an interstate compact. *See Georgia v. Pennsylvania R. Co.*, 324 U.S. 439, 450 (1945). The Court should not, however, fashion such a remedy without consideration of both the nature of *parens patriae* recoveries and the particular equitable considerations in this case. For reasons previously stated, Colorado does not believe that an award of money damages based on all losses suffered as a result of post-Compact well pumping in violation of the Arkansas River Compact is a fair and equitable remedy for a violation of this Compact prior to the time that Colorado knew, or should have known, that post-Compact well pumping was depleting the usable Stateline flows of the Arkansas River in violation of Article IV-D of the Compact. Further, Colorado believes that in fashioning a fair and equitable remedy in this case, the Court should take into consideration the difficulty of proving depletions to Stateline flows caused by well pumping. *See* Colorado's Brief in Support of Exceptions 30-37; *see also Kansas v. Colorado*, 206 U.S. 46, 107 (1907) ("The underground movement of water will always be a problem of uncertainty.")

IV. THE UNITED STATES DOES NOT ACCURATELY STATE COLORADO'S POSITION ON PREJUDGMENT INTEREST AND DOES NOT ADDRESS COLORADO'S ARGUMENT THAT AN AWARD OF PREJUDGMENT INTEREST BEGINNING IN 1969 IS INCONSISTENT WITH THE COURT'S 1995 OPINION

The United States asserts that Colorado objects to the Special Master's recommendation that prejudgment interest be awarded for the period from 1969 to the present, "urging the Court to adopt a categorical rule barring an

award of prejudgment interest for violation of an interstate compact apportioning the flows of an interstate river." Brief for the United States 11. The United States misstates Colorado's position.

Colorado urged the Court to follow the traditional common law rule that prejudgment interest is not awarded on unliquidated damages, absent bad faith or other exceptional circumstances. Colorado Brief in Support of Exceptions 28; *see Kansas v. Colorado*, 206 U.S. 46, 96-98 (1907) (power granted by the Constitution vests this Court with power to settle disputes between states); *Texas v. New Mexico*, 482 U.S. 124, 129 (1987) (looking to general principles of contract law to determine whether Court should provide a remedy). In the alternative, if the Court concludes that an award of prejudgment interest is discretionary, Colorado has taken issue with the Master's finding that, by 1968, Colorado knew, or should have known, that post-Compact well pumping in Colorado was causing such depletions. Colorado's Reply Brief 19-21. The United States says that "the Master reasonably balanced the relevant factors in awarding prejudgment interest beginning in 1969, when, the Master found, Colorado first knew or should have known that groundwater pumping in [Colorado] was depleting stateline flows of the Arkansas River." Brief for the United States 12-13.[6] However, the United States does not address Colorado's argument that the Master's finding is inconsistent with this Court's 1995 opinion, holding that the evidence available to Kansas was too vague and conflicting to demonstrate that Kansas inexcusably delayed in bringing its claim. Colorado's Reply Brief 20. Nor does the United States address Colorado's argument that if damages are

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[6] The United States does not fully state the Master's finding. He found that by 1969, Colorado knew, or should have known, that post-Compact well pumping was causing material depletions of *usable* Stateline flows. Third Report at 103.

awarded to the State of Kansas based on the losses suffered by individual water users in Kansas, an award of prejudgment interest should not be made because it would overcompensate Kansas for losses to the State of Kansas and the general economy of Kansas. *Id.* at 34-35.

CONCLUSION

The United States did not participate in the remedies phase of this case and does not have a direct stake in the issues it has chosen to address. Its brief does not present a principled basis for distinguishing the key Eleventh Amendment case of *North Dakota v. Minnesota*. It argues a *parens patriae* damages theory that will have far-reaching consequences, and misstates or ignores Colorado's argument regarding prejudgment interest. For the reasons stated, Colorado's exceptions to the Master's Third Report should be granted.

Respectfully submitted,

KEN SALAZAR
Attorney General of Colorado

CAROL D. ANGEL
Senior Assistant Attorney General

DAVID W. ROBBINS
Special Assistant Attorney General
Counsel of Record

DENNIS M. MONTGOMERY
Special Assistant Attorney General

HILL & ROBBINS, P.C.
1441 - 18th Street, #100
Denver, Colorado 80202
Telephone: (303) 296-8100

Attorneys for Defendant State of Colorado

APPENDIX

Kansas Statutes Annotated
§§ 82a-1801 to 82a-1803

82a-1801

CHAPTER 82A. – WATERS AND WATERCOURSES
ARTICLE 18. – WATER LITIGATION

82a-1801. **Moneys recovered in certain litigation; disposition.** (a) Amounts recovered by the state of Kansas from a settlement, judgment or decree in the litigation brought in 1985 by the state of Kansas against the state of Colorado to resolve disputes arising under the Arkansas river compact shall be deposited in the state treasury and credited as follows:

(1) Until the aggregate amount of moneys credited to the interstate water litigation fund equals the aggregate of all amounts certified by the attorney general under subsection (b), 100% shall be credited to the interstate water litigation fund.

(2) When the aggregate amount of moneys credited to the interstate water litigation fund equals the aggregate of all amounts certified by the attorney general under subsection (b), 33 1/3% shall be credited to the state water plan fund for use for water conservation projects and 66 2/3% shall be credited to the water conservation projects fund.

(b) The attorney general shall certify to the director of accounts and reports any expenses incurred by the state in the litigation brought in 1985 by the state of Kansas against the state of Colorado to resolve disputes arising under the Arkansas river compact and in preparation for such litigation.

82a-1802

CHAPTER 82A. – WATERS AND WATERCOURSES
ARTICLE 18. – WATER LITIGATION

82a-1802. Same; interstate water litigation fund. (a) There is hereby established in the state treasury the interstate water litigation fund, to be administered by the attorney general.

(b) Revenue from the following sources shall be credited to the interstate water litigation fund:

(1) Amounts provided for by K.S.A. 82a-1801; and

(2) moneys received from any source by the state in the form of gifts, grants, reimbursements or appropriations for use for the purposes of the fund.

(c) From the moneys first credited to the interstate water litigation fund, persons or entities that contributed moneys to the court cost fund account of the office of the attorney general for use in the litigation described in subsection (b)(1) shall be reimbursed the amount contributed. The balance of moneys credited to the fund shall be expended only for the purpose of paying expenses incurred by the state in:

(1) Current or future litigation or preparation for future litigation with another state, the federal government or an Indian nation to resolve a dispute concerning water; or

(2) monitoring or enforcing compliance with the terms of an interstate water compact or a settlement, judgment or decree in past or future litigation to resolve a dispute with another state, the federal government or an Indian nation concerning water.

(d) Interest attributable to moneys in the interstate water litigation fund shall be credited to the state general fund as provided by K.S.A. 75-4210a and amendments thereto.

(e) All expenditures from the interstate water litigation fund shall be made in accordance with appropriation acts upon warrants of the director of accounts and reports issued pursuant to vouchers approved by the attorney general or a person designated by the attorney general.

(f) Unless the attorney general certifies to the director of accounts and reports as of June 30, 2001, that there is on-going litigation or preparation for litigation between the state of Kansas and another state, the federal government or an Indian nation to resolve a dispute concerning water, on July 1, 2001: (1) The director of accounts and reports shall transfer and credit all moneys in the interstate water litigation fund to the state general fund; and (2) the interstate water litigation fund shall thereupon be abolished.

82a-1803

CHAPTER 82A. – WATERS AND WATERCOURSES
ARTICLE 18. – WATER LITIGATION

82a-1803. Same; water conservation projects fund. (a) There is hereby established in the state treasury the water conservation projects fund, to be administered by the director of the Kansas water office.

(b) Revenue from the following sources shall be credited to the water conservation projects fund:

(1) Amounts provided for by K.S.A. 82a-1801; and

(2) moneys received from any source by the state in the form of gifts, grants, reimbursements or appropriations for use for the purposes of the fund.

(c) Moneys credited to the water conservation projects fund may be expended only for the purpose of paying all or a portion of the costs of the following water management, conservation, administration and delivery projects, and similar types of projects, in those areas of the state lying in the upper Arkansas river basin and directly impacted by the provisions of the Arkansas river compact between this state and the state of Colorado:

(1) Efficiency improvements to canals or laterals owned by a ditch company or projects to improve the operational efficiency or management of such canals or laterals;

(2) water use efficiency devices, tailwater systems or irrigation system efficiency upgrades;

(3) water measurement flumes, meters, gauges, data collection platforms or related monitoring equipment;

(4) artificial recharge or purchase of water rights for stream recovery or aquifer restoration;

(5) maintenance of the Arkansas river channel; or

(6) monitoring and enforcement of Colorado's compliance with the Arkansas river compact.

Moneys credited to the fund may be expended to reimburse costs of projects described by this subsection that were required by the division of water resources and commenced on or after July 1, 1994.

(d) Any person or entity may apply to the director of the Kansas water office for the expenditure of moneys in the water conservation projects fund for the purposes provided by this section. The director of the Kansas water office and the chief engineer of the division of water resources of the department of agriculture shall review and approve each proposed project for which moneys in the fund will be expended. In reviewing and approving proposed projects, the director and the chief engineer shall give priority to: (1) Projects that achieve the greatest water conservation efficiency for the general good; and (2) projects that have been required by the division of water resources. Upon such review and approval, the director of the Kansas water office shall request the legislature to appropriate, as a line item, moneys from the fund to pay all or a portion of the costs of the specific project, except that any project for which an aggregate of less than $10,000 will be expended from the fund shall not require a line-item appropriation.

(e) Interest attributable to moneys in the water conservation projects fund shall be credited to the state general fund as provided by K.S.A. 75-4210a and amendments thereto.

(f) All expenditures from the water conservation projects fund shall be made in accordance with appropriation acts upon warrants of the director of accounts and reports issued pursuant to vouchers approved by the

director of the Kansas water office or a person designated by the director of the Kansas water office.